2006

Doug Jessop Construction, Inc., Sage Builders v. Joseph D. Anderton, Prime Time Marketing Services, Inc. : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DOUG JESSOP CONSTRUCTION, INC., d.b.a. SAGE BUILDERS, Petitioner/Appellee, vs. JOSEPH D. ANDERTON, an individual, and PRIME TIME MARKETING SERVICES, INC., Respondents/Appellants.	**REPLY BRIEF OF APPELLANTS JOSEPH D. ANDERTON AND PRIME TIME MARKETING SERVICES, INC.** **Case No. 20060979-CA**

**APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY,
HONORABLE GLENN K. IWASAKI, DISTRICT COURT JUDGE**

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IN THE UTAH COURT OF APPEALS

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Doug Jessop Construction, Inc., dba Sage Builders, Petitioner and Appellee, v. Joseph D. Anderton and Prime Time Marketing Services, Inc., Respondents and Appellants.	ORDER Case No. 20060979-CA

Before Judges Bench, Orme, and Thorne.

This matter is before the court on Appellee's motion to strike portions of Appellant's reply brief. Appellee contends that various assignments of error and arguments contained in the reply brief fail to comply with rule 24(c) of the Utah Rules of Appellate Procedure.

The court has reviewed the briefs and has determined that the majority of the arguments at issue here were not improperly raised as an issue for the first time in Appellant's reply brief.

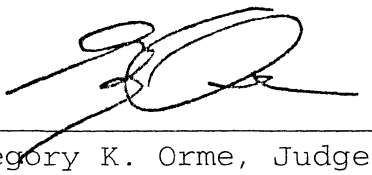
However, the court agrees with Appellee that the issue of whether "the [district] court . . . erred in including Mr. Anderton, in his individual capacity, in the proceedings below," was raised for the first time in the reply brief. This court generally declines to consider matters raised for the first time in the reply brief. Beacham v. Fritzi Realty Corp., 2006 UT App 35,¶6,n.1, 131 P.3d 271. Because this particular argument was not raised in the opening brief or in response to a "new matter set forth in the opposing brief," this court will not consider it. See Mi Vida Enters. v. Steen-Adams, 2005 UT App 400, ¶13, n.3, 122 P.3d 144 (quoting Utah R. App. P. 24(c)).

In addition, the court notes that each side has requested the opportunity to provide supplemental authority based upon a recently issued decision. Rule 24(j) of the Utah Rules of Appellate Procedure provides specific instruction on the manner by which supplemental authority shall be provided to the court.

Accordingly, IT IS HEREBY ORDERED that motion to strike is granted in part and denied in part. The argument that the district court erred "in including Mr. Anderton, in his individual capacity, in the proceedings below," shall be stricken from the reply brief. The remainder of the reply brief shall be considered by the court.

DATED this 19th day of September, 2007.

FOR THE COURT:



Gregory K. Orme, Judge

IN THE UTAH COURT OF APPEALS

DOUG JESSOP CONSTRUCTION, INC., d.b.a. SAGE BUILDERS, Petitioner/Appellee, vs. JOSEPH D. ANDERTON, an individual, and PRIME TIME MARKETING SERVICES, INC., Respondents/Appellants.	**REPLY BRIEF OF APPELLANTS JOSEPH D. ANDERTON AND PRIME TIME MARKETING SERVICES, INC.** **Case No. 20060979-CA**

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I. SUMMARY.

The central issue in this appeal is whether the trial court erred in determining that the Notice of Interest and the two subsequent notices of lis pendens filed by Respondent, Appellant Prime Time Marketing Services, Inc. ("Prime Time"), by and through its corporate officer Respondent, Appellant Joseph D. Anderton ("Mr. Anderton"), were wrongful liens under Utah Code Ann. § 38-9a-102. Petitioner, Appellee, Doug Jessop Construction, Inc., d.b.a. Sage Builders ("Sage") attempts to shift focus away from this central issue and, instead, devotes much of its Opposition Brief to arguing that Prime Time and Mr. Anderton failed to preserve the issues for appeal. (Brief of Appellee Doug Jessop Construction, Inc., d.b.a. Sage Builders ("Opposition Brief"), filed May, 14, 2007, pp. 15-16, 23, 27-31.) As set forth below, however, Prime Time and Mr. Anderton properly preserved each of these issues for appeal despite the summary nature of the proceedings below.

Returning to the central issue, Sage argues that the Notice of Interest and the two lis pendens filed in this action were filed in violation of the Utah Wrongful Lien Injunctions Act, Utah Code Ann. § 38-9a-101, *et. seq.*, and, therefore, were subject to summary nullification. (Opposition Brief, pp. 23-25, 32-45.) However, because these filings were made pursuant to a legitimate dispute over entitlement to certain real property (the "Property"), were specifically authorized by statute, and were not made in violation of the Wrongful Lien Injunctions Act, they are not "wrongful liens," as defined by the Act. As a result, the trial court committed error by nullifying them.

The district court erred in nullifying the Notice of Interest and the two lis pendens because doing so required the district court to determine the underlying merits of an acknowledged dispute between Sage and Prime Time. This is directly contrary to the legislative intent of the Wrongful Lien Injunctions Act, as exhibited by the requirements and limitations of the Act itself. The Act, with its summary procedures, was clearly intended to address only "baseless liens" and not those predicated on actual, good faith disputes between the parties. The district court committed error when it failed to follow those summary procedures, which culminated in it issuing a vague and ambiguous order which inexplicably swept up Appellant Mr. Anderton, who was not a party to the underlying property dispute. This led to the initial impermissible nullification of the Notice of Interest and the First Notice of Lis Pendens.[1]

Moreover, the trial court, while considering the merits of the underlying property dispute in its initial ruling, inexplicably declined to properly address the merits of the parties' dispute when it dismissed the Counterclaim filed by the Appellant Prime Time; that dismissal, in turn, led the district court to hold that the First Notice of Lis Pendens was improperly filed because it was not filed as a corollary to the filing of any claim.

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[1] As is evident from a review of the record in this matter, this dispute spiraled out of control at the trial court level. First, the district court issued an wrongful lien injunction without the necessary finding that Sage had proved, by a preponderance of the evidence, that the filings in question were "wrongful liens" under the terms of the Wrongful Lien Injunctions Act. [R. at 969.] Then, on the basis of that injunction, the trial court removed the Second Notice of Lis Pendens, which it had specifically authorized Prime Time to file. [R. at 970, p. 15-21.] Finally, the trial court held Mr. Anderton, personally, in contempt of court for the actions of Prime Time in following the court's suggestion to file that Second Notice of Lis Pendens. [R. at 971.] This contempt finding resulted in Mr. Anderton being jailed.

The dismissal of the Counterclaim and First Notice of Lis Pendens was error and contrary to the intended scope of the Wrongful Lien Injunctions Act.

Further, with regard to the Second Notice of Lis Pendens filed by Prime Time, at the hearing on August 11, 2006, the district court, with Sage's concurrence and predicated upon the dismissal of the Counterclaim, expressly authorized the filing, by Prime Time, of a second action between the parties for "whatever relief" and "without prejudice." [R. at 969, pp. 31-32, 34-35, 55-58.] Yet when Prime Time did exactly that, filed a new action in which it asserted the merits of its Counterclaim, along with a corollary Second Notice of Lis Pendens, the district court then determined that the filing of the Second Notice of Lis Pendens violated its previous order prohibiting the filing of further "wrongful liens." [R. at 970, pp. 15-21.] This was clear error.

Because the district court erred in nullifying the Notice of Interest and the two lis pendens and in dismissing the Counterclaim, this Court should reverse the holdings of the trial court and reverse the trial court's award of attorneys' fees and costs to Sage.

II. THE TRIAL COURT ERRED IN INTERPRETING THE SCOPE AND REQUIREMENTS OF THE WRONGFUL LIEN ACT, WHICH LED TO THE IMPROPER NULLIFICATION OF THE NOTICE OF INTEREST AS WELL AS THE TWO LIS PENDENS.

Sage's arguments that the Notice of Interest and lis pendens were properly nullified is based on an argument regarding the legislative intent and the intended scope of the Wrongful Lien Injunctions Act. (Opposition Brief, pp. 46-47.) Sage argues, both below and before this Court, that the intended scope and legislative intent of the Wrongful Lien Injunctions Act is significantly broad so as to effectively allow a trial

court to decide, ex parte, issues of disputed property interest. (Opposition Brief, pp. 36-37.) That is contrary to the face of the statute which sets forth detailed procedures and places limitations on the scope of the Wrongful Lien Injunctions Act, both of which are clear expressions of legislative intent and contrary to the trial court's rulings.[2]

A. The Wrongful Lien Injunctions Act is Designed to Nullify Only Baseless Liens.

The Wrongful Lien Injunctions Act is designed for the narrow purpose of removing "wrongful liens"[3] in circumstances where there is no dispute regarding title and possession of property and where the party recording the "wrongful lien" has no reasonable basis to claim an interest in the property. Essentially, the Wrongful Lien Injunctions Act is designed to nullify only baseless liens, as evidenced by the fact that the Wrongful Lien Injunctions Act defines "wrongful lien" narrowly. *See, e.g., Anderson v. Wilshire*, 123 P.3d 393, 2005 UT 59, ¶ 10 (interpreting the parallel Wrongful Liens and Wrongful Judgment Liens statute).

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[2] Sage further argues that if a party could file a lis pendens in response to a petition to nullify a wrongful lien, the purpose of the Wrongful Lien Injunctions Act would be eviscerated. (Opposition Brief, pp. 25.) This argument ignores the fact that the legislature has set out mechanisms for parties who claim an interest in property to protect that interest by filing a notice of interest or a lis pendens. (Brief of Respondents and Appellants [sic] Joseph D. Anderton and Prime Time Marketing Services, Inc. ("Appellants' Brief"), pp. 35-37, 44-46.)

[3] Furthermore, the Wrongful Lien Injunctions Act is limited in scope to removing only liens. Utah Code Ann. § 38-9a-201. As set forth in Appellants' Brief, the Notice of Interest and lis pendens were not "liens" as defined by the Act. (Appellants' Brief, pp. 19-23, 44-45.) Sage cites no Utah law to suggest otherwise. (Opposition Brief, pp. 33-40.) Instead, Sage relies on Utah cases which have not specifically decided this issue. (*Id.*) These cases, however, do not support Sage's arguments.

Under the Wrongful Lien Injunctions Act, the injured party is cast in terms of being the "victim." Utah Code Ann. § 38-9a-201(1)(a). "Victim" implies mistreatment to, and to victimize means to subject to deception and fraud. "Victim" is not a word which applies when the parties have a genuine dispute. The term "wrongful" has a similar connotation of something that is characterized by unfairness, injustice, or is contrary to law. Clearly, these are not the words framing a legitimate controversy.

That the Wrongful Lien Injunctions Act was intended to address only the most baseless of liens is further evidenced by the procedure of the Act, and by the fact that, at the injunction hearing to determine whether there is a "wrongful lien," "[t]he burden is on the petitioner to show by a preponderance of the evidence that the respondent has made, uttered, recorded or filed a wrongful lien..." Utah Code Ann. § 38-9a-203(2). As set forth in the statute, the Wrongful Lien Injunctions Act provides a very narrow remedy for circumstances where the party filing a lien has no basis to do so. This is not the case where, as here, the party moving for an injunction admits that there is a genuine controversy regarding the property.

Consistent with this intent, the Wrongful Lien Injunctions Act is not designed to remove property filings that are statutorily authorized, such as the Notice of Interest and the two lis pendens. The lower court erred in nullifying the Notice of Interest and the two lis pendens because the parties have a legitimate dispute regarding the disposition of title to, and possession of, the Property and because the filings made by Prime Time were authorized by statute.

B. Sage Acknowledges That the Parties Have a Genuine Dispute Regarding the Property.

Notably, Sage admits in its Opposition Brief that the parties have a genuine dispute regarding the Property. (Opposition Brief, p. 4.) In fact, Sage has admitted throughout the proceedings on appeal and below that the parties dispute the proper disposition of the Property. For example, on June 28, 2006, Sage filed a Petition for Civil Wrongful Lien Injunction & Request for Ex Parte Civil Wrongful Lien Injunction (the "Petition"), which acknowledged that the parties had a dispute over the Property. [R. at 1-28.] Sage's Petition makes clear that Prime Time asserted an interest in the Property and that Sage disputed that interest. [*Id.* at p. 2] Further, Sage asserted in the district court that "[t]he sale of the Property did not go through for reasons disputed by the parties." [R. at 48 and 446.] Most telling, Sage admits that it has refused any attempt by Prime Time to elect a remedy for Sage's breach of the REPC and that it refused to refund Prime Time's earnest money, which was paid to secure its interest in the Property. [R. at 969, p. 34; (Opposition Brief, pp. 4, 8).] Prime Time and Mr. Anderton's Answer to Petition and Verified Counterclaim further establish that the parties dispute whether the Notice of Interest and lis pendens were proper. [R. at 87-95.]

Because the parties have a genuine dispute regarding the disposition of the Property, the Wrongful Lien Injunctions Act is not applicable. The Wrongful Lien Injunctions Act was designed for the limited purpose of nullifying "wrongful liens" as defined above. Contested matters are outside of the parameters of the Wrongful Lien Injunctions Act. That is why the petitioner in such an action is charged with the burden

of showing, "by a preponderance of the evidence," that a "wrongful lien" has been recorded. Utah Code Ann. § 38-9a-203. Filings that are authorized by statute, or that are made with a "reasonable basis" of belief that the filing party has an interest in the Property are exempt from the Wrongful Lien Injunctions Act. Utah Code Ann. § 38-9-1 and § 76-6-503.5. The Wrongful Lien Injunctions Act was designed to nullify only the most baseless liens in circumstances where the filing party has no basis upon which to believe that he holds an interest in the subject property. Given that the parties here acknowledge both a dispute over the Property and the execution of a valid REPC for the sale of the Property, it was an error for the lower court to nullify the Notice of Interest and the lis pendens.

C. The District Court Erred in Entering the Wrongful Lien Injunction Because Sage's Petition Was Both Deficient and Unclear.

Because the remedy provided by the Wrongful Lien Injunctions Act is so extraordinary, the requirements for obtaining that relief are particular and must be met precisely. A petition for a civil wrongful lien injunction must include "the specific actions and dates of the actions constituting the alleged wrongful lien." Utah Code Ann. § 38-9a-202(c). Further, the petition must specifically identify the party that filed the allegedly "wrongful" lien. Utah Code Ann. § 38-9a-202(b). Most importantly, the petition must include "corroborating evidence of a wrongful lien..." Utah Code Ann. § 38-9a-202(e). The forms adopted by the Administrative Office of the Courts support this language by requiring the moving party to attach to the petition a copy of the alleged

"wrongful lien." [R. at 151-153, p. 2.] Further, the adopted forms provide that a civil lien injunction shall contain the following language:

> The **Respondent** is enjoined from making, uttering, recording, or filing any further liens without specific permission from the court.
>
> The **lien referenced in the Petition**, a copy of which is attached to this Order, is nullified.

[R. at 156 (emphasis added).]

The lower court's Ex Parte Civil Wrongful Lien Injunction and subsequent Order Dissolving Temporary Restraining Order [sic] and Establishing Permanent Civil Wrongful Lien Injunction were improper because: (1) they nullified a filing that was not referenced in the Petition for Civil Wrongful Lien Injunction, and for which there was no corroborating evidence of "wrongful lien;" and (2) they include Mr. Anderton, individually, as a respondent.

Sage filed its Petition for Civil Wrongful Lien Injunction on June 28, 2006. [R. at 1-22.] The lower court denied the request and asked Sage to further brief the issue. [R. at 46.] The First Notice of Lis Pendens was filed on July 13, 2006. [R. at 82.] Subsequently, on July 17, 2006, Sage re-filed the same Petition and filed a memorandum in support of its request. [R. at 47-76.] At the same time, Sage filed a proposed order granting the injunction, to which a copy of the First Notice of Lis Pendens was attached. [R. at 79-82.] Despite the fact that Sage knew that the First Notice of Lis Pendens had already been filed, as evidenced by the fact that it is attached to the proposed order, filed concurrently, neither the Petition nor the memorandum in support of the Petition even mentions the First Notice of Lis Pendens. [R. at 47-76.] Thus, the record contains no

"corroborating evidence" that the First Notice of Lis Pendens was a "wrongful lien," as required by the statute. Utah Code Ann. § 38-9a-202(e). Additionally, with regard to the nullification of the First Notice of Lis Pendens, the Petition failed to satisfy the Act's requirements that the Petition contain "the specific actions and dates of the actions constituting the alleged wrongful lien." Utah Code Ann. § 38-9a-202(c). These deficiencies were not remedied at the hearing on August 11, 2006, regarding the propriety of the injunction. In fact, Sage never remedied these substantial deficiencies.[4]

This "corroborating evidence" requirement cannot be waived by the district court under the statute. It must be satisfied. In this case, it was not satisfied. Accordingly, it was improper under the Wrongful Lien Injunctions Act for Sage to include the First Notice of Lis Pendens in the proposed order filed that same day. [R. at 79-80.] More importantly, it was improper for the lower court to issue the injunction, which admits that the lien "referenced in the Petition" is not the First Notice of Lis Pendens. [R. at 80.]

The lower court perpetuated that error by granting other requests for relief based on the original Petition, which was clearly deficient. The lower court issued, among other things, a permanent civil wrongful lien injunction, an injunction nullifying the Second Notice of Lis Pendens, and an order granting attorneys' fees to Sage, all based on

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[4] Sage seeks to excuse this deficiency by arguing that it did not become aware of the First Notice of Lis Pendens until after it filed its Petition. (Opposition Brief, p. 25.) As set forth above, however, Sage was clearly aware that the First Notice of Lis Pendens had been filed on July 17, 2006, when it filed the proposed Ex Parte Civil Wrongful Lien Injunction. [R. at 47-82.] Accordingly, Sage was fully aware of the First Notice of Lis Pendens when it filed its Petition for the second time with the supporting memorandum.

the initial Petition, which was procedurally and substantively deficient. Accordingly, the lower court's orders must be vacated entirely.

In addition to the lower court's error in nullifying the First Notice of Lis Pendens, the court also erred in including Mr. Anderton, in his individual capacity, in the proceedings below. Although Sage's Petition for Civil Lien Injunction names Mr. Anderton personally, the court erred in including Mr. Anderton in the proceedings below given that Mr. Anderton did not undertake the filing of the Notice of Interest or the two notices of lis pendens in his individual capacity. Each of these instruments was filed only by Prime Time. Accordingly, Mr. Anderton, in his individual capacity, was improperly included in the proceedings below. At the very least, the lower court's rulings should be reversed as they apply to Mr. Anderton personally.

III. NOTICES OF INTEREST AND LIS PENDENS ARE NOT WRONGFUL "LIENS" UNDER THE WRONGFUL LIEN INJUNCTIONS ACT.

Contrary to Sage's argument, neither the Notice of Interest nor the two lis pendens constitute "wrongful liens" under the Wrongful Lien Injunctions Act. (Opposition Brief, pp.15, 22-25, 32-45.)[5] Utah Code Ann. § 38-9a-201 allows "[a]ny person who believes

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[5] In its Opposition Brief, Sage argues that the nullification of the Notice of Interest was proper because the parties stipulated that the filing of the Notice of Interest was improper. (Opposition Brief, pp. 16-19.) Sage even pushes this argument so far as to assert that "the pleadings filed by Anderton and Prime Time made no argument in opposition to the Notice of Interest being a wrongful lien..." These arguments deliberately misinterpret both the pleadings and the arguments of the parties in this matter. First, the Answer to Petition and Verified Counterclaim filed by Mr. Anderton and Prime Time specifically denies that the Notice of Interest was improper. [R. at 88.] Second, the district court did not specifically find that the parties had stipulated that the Notice of Interest was a wrongful lien. A careful reading of the transcript of the August

(continued...)

that he or she is the victim of a wrongful lien" to "file a verified written petition for a civil wrongful lien injunction..." *Id.* The Act then defines "wrongful lien" as "a lien made in violation of Section 76-6-503.5, and includes an instrument or document as defined in Section 38-9-1." Utah Code Ann. § 38-9a-102. Accordingly, in order to be subject to the Wrongful Lien Injunctions Act, a "wrongful lien" must fall under one of the definitions given in Utah Code Ann. § 38-9-1 or Utah Code Ann. § 76-6-503.5. Sage has failed entirely to even allege, let alone demonstrate, that the Notice of Interest or either lis pendens falls within either definition of "wrongful lien."

Sage argues that a lis pendens is necessarily a lien because it is not specifically excluded from the terms of the Wrongful Lien Injunctions Act. (Opposition Brief, pp. 33-38.) Essentially, Sage argues that because lis pendens are not specifically excluded, they are specifically included. (*Id.*) This argument is unpersuasive given that lis pendens do not satisfy the definition of "wrongful lien" under any of the statutory schemes cited by Sage.

A. The Notice of Interest and The Two Lis Pendens Were Not Wrongful Liens Under Utah Code Ann. § 38-9-1 Because They Were Authorized by Statute.

Utah Code Ann. § 38-9-1 defines "wrongful lien" as:

(...continued)
11, 2006, hearing reveals that the district court found its dialog with Prime Time's counsel sufficiently vague on this topic that it specifically ruled on the matter and found that the Notice of Interest was properly nullified. [R. at 969, p. 55.] It is this finding that Prime Time claims is error. Even if the district court found that the parties stipulated that the Notice of Interest was a wrongful lien, such a finding was a clear error and should be reversed given that the parties made no clear stipulation on the matter.

> ...any document that purports to create a lien or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not:
>
> (a) expressly authorized by this chapter or another state or federal statute;
>
> (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or
>
> (c) signed by or authorized pursuant to a document signed by the owner of the real property.

Contrary to Sage's arguments, this section does not apply to the Notice of Interest or the two lis pendens because, pursuant to this section, a "wrongful lien" cannot be anything that is "expressly authorized by this chapter or another state or federal statute." *Id.* The Notice of Interest was specifically authorized by Utah Code Ann. § 57-9-4, which provides that:

> Any person claiming an interest in land may preserve and keep effective such interest by filing for record...a notice in writing, duly verified by oath, setting forth the nature of the claim.

(*Id.*; *see also* Appellants' Brief, pp. 44-46.) Likewise, the lis pendens were specifically authorized by Utah Code Ann. § 78-40-2, which provides that:

> In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby.

(*Id.*; *see also* Appellants' Brief, p. 33.) Because these instruments were "expressly authorized by" a "state or federal statute," they cannot be "wrongful liens" as defined in Utah Code Ann. § 38-9-1. *Eldridge v. Farnsworth*, 2007 UT App 243, ¶ 49.

Further, the lis pendens are specifically exempt from the "wrongful lien" definition set forth in Utah Code Ann. § 38-9-1. Utah Code Ann. § 38-9-2 provides that "[t]he provisions of this chapter shall not prevent a person from filing a lis pendens in accordance with Section 78-40-2 or seeking any other relief permitted by law." *Id.* Under this section, a lis pendens *cannot* be a "wrongful lien" as defined by Utah Code Ann. § 38-9-1. *Eldridge*, 2007 UT 243, ¶¶ 49-50.

In *Eldridge*, decided just last week, this Court was asked to hold that a lis pendens filed in connection with a legal action affecting title to real property was a "wrongful lien." *Id.* This Court declined to do so finding that it would be inconsistent with "Utah case law to look beyond the face of the complaint when filed to determine that the lis pendens amounted to a wrongful lien." *Id.* at ¶ 50. Likewise, in the instant matter, it was improper for the district court to go beyond the filing of the pleadings to determine whether the notices of lis pendens amounted to "wrongful liens." Just as in *Eldridge*, Sage was required to utilize the proper statutory scheme if it wanted to remove the lis pendens rather than relying on the summary proceedings associated with the Wrongful Lien Injunctions Act. *Id.*

Because the definition of "wrongful lien" under Utah Code Ann. § 38-9-1 cannot be applied to this circumstance, Sage had to prove in the lower court, by a preponderance of the evidence, that Prime Time violated Utah Code Ann. § 76-6-503.5 in order to

prevail on its claim for a civil lien injunction. Utah Code Ann. §§ 38-9a-102 and 203(2). Sage not only failed to prove this, it failed to even allege it.

B. The Notice of Interest and The Two Lis Pendens Were Not Wrongful Liens Under Utah Code Ann. § 76-6-503.5 Because Prime Time Had an "Objectively Reasonable" Basis to Believe That it Had a "Present Lawful" Interest in the Property.

Sage incorrectly argues that Prime Time and Mr. Anderton violated Utah Code Ann. § 76-6-503.5. (Opposition Brief, p. 32.) That section provides:

> (2) A person is guilty of the crime of wrongful lien if that person knowingly makes, utters, records, or files a lien:
>
> (a) having no objectively reasonable basis to believe he has a present and lawful property interest in the property or a claim on the assets; or
>
> (b) if the person files the lien in violation of a civil wrongful lien injunction pursuant to Title 38, Chapter 9a, Wrongful Lien Injunctions.

Sage cannot allege that either the Notice of Interest or the notices of lis pendens violated subsection 2(a). (Opposition Brief, p. 32.) In fact, it is impossible for Prime Time to have violated subsection (2)(a) because, as a matter of law, Prime Time had an "objectively reasonable basis to believe" it had a "present and lawful property interest" in the Property. On October 10, 2005, the parties entered into a Real Estate Purchase Contract ("REPC") under which Sage agreed to sell the Property to Prime Time. (Appellants' Brief, Ex. 1.) The REPC gave Prime Time an interest in the Property. *Bill Nay & Sons Excavating v. Neeley Construction Co.*, 677 P.2d 1120, 1121 (Utah 1984) ("The interest of a purchaser under a real estate contract is an interest in real property.") Prime Time had a right to enforce the REPC and to take title to, and possession of, the

Property. Accordingly, Prime Time did not violate Utah Code Ann. § 76-6-503.5(2)(a) by filing the Notice of Interest and lis pendens to protect that interest.

Even if the REPC did not give Prime Time an interest in the Property, it certainly gave Prime Time an "objectively reasonable basis" to believe that it had an interest in the Property. Utah Code Ann. § 76-6-503.5(2)(a). Therefore, even if Prime Time did not actually have an interest in the Property, it did not violate subsection (2)(a) because it had a reasonable basis to believe it had an interest in the Property.

Sage argues that Prime Time had no interest in the Property because it attempted to cancel the REPC. [R. at 969, pp. 42-43.] However, Sage admits that it refused any attempt by Prime Time to cancel the REPC and further, refused to return Prime Time's earnest money. (Opposition Brief, pp. 4, 8.) Accordingly, Prime Time had a continuing interest in the Property and, therefore, could not have violated subsection (2)(a).

Sage argues, instead, that Prime Time violated subsection (2)(b). (Opposition Brief, pp. 43-45.) Prime Time did not violate subsection (2)(b) because neither the Notice of Interest nor the lis pendens were filed "in violation of a civil wrongful lien injunction." The Notice of Interest was filed on May 10, 2006. The First Notice of Lis Pendens was filed on July 13, 2006. The lower court did not issue the Ex Parte Civil Wrongful Lien Injunction until July 17, 2006. Accordingly, when the Notice of Interest and the First Notice of Lis Pendens were filed, there was no injunction in place. The Second Notice of Lis Pendens was not a violation of an injunction because it was specifically authorized both by the lower court and by Sage. *See* section IV.B below.

Because the Notice of Interest and the two lis pendens did not violate Utah Code Ann. § 76-6-503.5 or Utah Code Ann. § 38-9-1, they were each proper filings and the lower court erred in nullifying them.[6] If Sage wanted to pursue the removal of these filings, it should have done so under the proper statutes. (Appellants' Brief, pp. 35-37.)

IV. THE DISTRICT COURT ERRED IN DISMISSING THE COUNTERCLAIM AND THEN COMPOUNDED THAT ERROR BY NULLIFYING THE SECOND FILED NOTICE OF LIS PENDENS.

A. The District Court Erred When It Dismissed the Counterclaim.

In response to Sage's Petition for Civil Wrongful Lien Injunction, Mr. Anderton and Prime Time filed an Answer to Petition and Verified Counterclaim.[7] [R. at 87-95.] At the August 11, 2006, hearing, the lower court improperly dismissed that Counterclaim. [R. at 969, p 57.] As a result of its dismissal of the Counterclaim, the lower court nullified the First Notice of Lis Pendens, finding that it did not correspond to any properly filed complaint or counterclaim by Prime Time. [R. at 969, pp. 55-58.] However, the district court erred in dismissing the Counterclaim and, therefore, ultimately erred in nullifying the First Notice of Lis Pendens.

The Utah Supreme Court has held that actions brought under the parallel Wrongful Liens and Wrongful Judgment Liens Act ("Wrongful Judgment Liens Act" (Utah Code

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[6] Sage incorrectly argues that any error in nullifying the Notice of Interest was harmless because the injunction was issued based on both the Notice of Interest and the First Notice of Lis Pendens and, therefore, would have been issued even without a finding that the Notice of Interest was improper. (Opposition Brief, pp. 19-20.) However, given that the First Notice of Interest was also improperly nullified, as set forth above, the injunction did not constitute harmless error.

[7] The Counterclaim was filed by Prime Time alone.

Ann. § 38-9-1, *et. seq.*)) can contain claims other than for removal of a "wrongful lien." *Anderson v. Wilshire Investments, LLC*, 2005 UT 59, ¶ 14, 123 P.3d 292. In *Anderson*, the plaintiff sought to nullify a wrongful lien and also stated a claim to quiet title to the property at issue. *Id.* at ¶ 2. The district court denied the petition for removal of the lien and plaintiff appealed. *Id.* at ¶ 3. The Utah Supreme Court held that it did not have jurisdiction to hear the appeal because the district court's order was not a final judgment given that plaintiff's quiet title claim was still pending in the lower court. *Id.* at ¶ 17. In so doing, the Utah Supreme Court specifically held that the Wrongful Judgment Liens Act should be interpreted as treating a petition to nullify a wrongful lien "as a motion for an expedited proceeding addressing one issue within the context of a larger civil action, like a motion for partial summary judgment on the wrongful lien issue..." *Id.* at ¶ 14. The Court further held that this:

> ...interpretation is more consistent with the structure of the statute, which does not explicitly prohibit the petition from containing additional claims and, in fact, anticipates that the petition may include claims in addition to those subject to expedition...It is clear that the legislature recognized that a party may have claims beyond a request to nullify a wrongful lien. Nothing in the statute prohibits those claims from being initially pled in a petition to nullify. This suggests that the outcome of the summary lien proceeding does not necessarily end the controversy between the parties.

Id. The Court also held that the district court did not have the authority to dismiss the plaintiff's remaining claims at the hearing on the petition to nullify the lien. *Id.* at ¶ 18 ("even if the district court intended to dismiss each of the claims before it, it did not have authority to do so at the summary lien proceeding").

Although a district court is limited to determining whether there exists a "wrongful lien" at the hearing on a petition to nullify a "wrongful lien," the court is not limited in its ability to make a determination of the remaining rights and interests of the parties in the normal course. *Id.* at ¶ 14. This proposition is further supported by Utah R. Civ. P. 13(a), which provides that:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Based on the holding in *Anderson* and the compulsory counterclaim rule set forth above, Prime Time not only had the right to file the Counterclaim, it was obligated to do so. The district court, therefore, erred in dismissing the Counterclaim. The Counterclaim was properly before the lower court and the lower court "did not have the authority" to dismiss the Counterclaim at the summary lien hearing. *Id.* at ¶ 18. Correspondingly, the lower court erred in nullifying the First Notice of Lis Pendens, which was supported by the Counterclaim. The lower court compounded these errors by first telling Prime Time that it could file a second action seeking whatever "relief" it was entitled to and then nullifying the Second Notice of Lis Pendens filed in connection with the second action and holding that the Second Notice of Lis Pendens was filed in violation of its previous orders, which opened the door for a contempt proceeding.[8]

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[8] It is unclear why the district court dismissed the Counterclaim, finding that it had no jurisdiction to hear the Counterclaim, and then reclaimed its jurisdiction the next week to hear Sage's request to nullify the Second Notice of Lis Pendens, which was properly

(continued...)

Sage argues that the First Notice of Lis Pendens was improper because it was filed before Prime Time filed its Counterclaim. (Opposition Brief, p. 24.) The relevant filing, however, was the Petition, not the Counterclaim. Utah Code Ann. § 78-40-2 provides for the filing of a lis pendens "at the time of the filing the complaint or thereafter." Either "party" can record a lis pendens once an action has commenced affecting title to real property. *Eldridge v. Farnsworth*, 2007 UT App 243, ¶¶ 42, 44 ("a party may first record a lis pendens at any time after filing the complaint"). Accordingly, once the Petition was filed, Prime Time had a right to file the First Notice of Lis Pendens.

B. The District Court Erred in Nullifying the Second Notice of Lis Pendens Because It Was Specifically Authorized by the District Court.

On August 11, 2006, the lower court held a hearing in this matter to determine: (1) the propriety of the wrongful lien injunction previously entered; and (2) whether Mr. Anderton and Prime Time had the right to file a lis pendens on the Property pending the outcome of the disputes between the parties. [R. 969, p. 8.] At the hearing, the lower court erred in dismissing the Counterclaim, as set forth above. During that same hearing, however, the court, consistent with the argument of Sage's counsel, held that Mr. Anderton and Prime Time had the right to file a separate action asserting the claims found in the Counterclaim.

The court asked counsel for Sage whether Mr. Anderton and Prime Time were "entitled to file a lis pendens based upon a counterclaim that they filed in [the] action."

(...continued)
filed in connection with an action pending before another judge. [*Compare* R. at 969, pp. 57-58 *with* R. at 970, pp. 12-21.]

[*Id.* at 31.] That question prompted the following dialogue between the court and Sage's counsel:

> **Mr. Morris**: ...What they should have done is filed another complaint to assert their claims...
>
> **The Court**: They still can.
>
> **Mr. Morris**: Yeah, they still could, that's right. But they haven't. There's no lawsuit out there pending upon which they can properly record a lis pendens. They can't base it on the counterclaim in this proceeding because there should have never been a counterclaim in this proceeding.

[*Id.* at 31-32.] Later in the hearing, Sage's counsel stated that, if Mr. Anderton and Prime Time thought that there was a dispute about the REPC, "the burden was on them to file a complaint and to record a lis pendens. All right? That's what they needed to do." [*Id.* at pp. 34-35.][9]

In adopting the argument of Sage's counsel, the lower court held as follows:

> The Court finds that the notice of interest was a wrongful lien, and **a subsequent lis pendens that did not correspond with any filing of a complaint** was also a wrongful lien, and the Court orders the removal of both.
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> ***

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[9] In fact, beginning as early as it's Memorandum in Support of Petition for Civil Wrongful Lien Injunction, Sage admitted that Prime Time had the right to file a lawsuit against it and record a lis pendens in connection with such a suit. Specifically, Sage represented to the lower court that:

> If Prime Time sought to complete the transaction and assert any real interest in the home, it could have and should have initiated a lawsuit and recorded a Lis Pendens."

[R. at 74.]

> However, that does not mean that on subsequent - in any subsequent action, **my ruling is no bar to any subsequent independent action of a lawsuit by respondent against petitioner and whomever else for all of the alleged damages and whatever *relief* he wishes to do**. He is not prejudiced by my ruling; **he can pursue the matter**. And I'm sure that he will consider it.

[*Id.* at pp. 55-58 (emphasis added).][10]

It was based on the court's dismissal of the Counterclaim and the court's oral ruling, supported by the representations of Sage's counsel, that Mr. Anderton and Prime Time filed the subsequent action and the Second Notice of Lis Pendens. [R. at 665-667.] Given that these actions were expressly ratified not only by the court, but also by Sage's counsel, it is difficult to see how the lower court could justify removing that Second Notice of Lis Pendens two days after it was filed and just five days after expressly approving its filing.

Sage argues that the Second Notice of Lis Pendens was filed "in direct violation of the Wrongful Lien Injunction," and "without specific permission from the court." (Opposition Brief, pp. 32, 43-45.) To the contrary, as set forth above, the lower court gave Mr. Anderton and Prime Time specific permission to file a separate, independent action and the accompanying Second Notice of Lis Pendens. [R. at 969, p. 58.] By telling Mr. Anderton and Prime Time that its "ruling is no bar to any subsequent independent action of a lawsuit by respondent against petitioner and whomever else for

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[10] These representations by the lower court and Sage's counsel also contradict Sage's argument that a person or entity with a legitimate interest in real property has only "one chance" "to record a legal and proper document on [the property's] title without permission of the court." (Opposition Brief, pp. 36.) As expressed by both the court and Sage's counsel, there is no such thing as the "one chance rule" now advocated by Sage.

all of the alleged damages and whatever ***relief*** he wishes to do," that Mr. Anderton and Prime Time were "not prejudiced by [the court's] ruling," and that Mr. Anderton and Prime Time had every right to "pursue the matter," the lower court gave Mr. Anderton and Prime Time specific permission to file the second action against Sage and the accompanying Second Notice of Lis Pendens. [*Id.*][11]

V. ALL OF THE ISSUES THAT ARE CURRENTLY ON APPEAL WERE PROPERLY PRESERVED IN THE DISTRICT COURT.

Sage argues in its Opposition Brief that Mr. Anderton and Prime Time failed to preserve their arguments that the lower court improperly nullified the Notice of Interest and the two lis pendens filed on the Property. (Opposition Brief, pp. 13-14.) "In order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *438 Main Street v. Easy Heat, Inc.*, 99 P.3d 801, 813 (Utah 2004). Mr. Anderton and Prime Time satisfied this requirement:

- Mr. Anderton and Prime Time disputed the propriety of the Ex Parte Civil Wrongful Lien Injunction that nullified the Notice of Interest and the First

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[11] The fact that the district court later issued an order confirming the original ex parte injunction is also no bar to the second action or the Second Notice of Lis Pendens, as argued by Sage. (Opposition Brief, p. 32.) First, the court's August 14, 2006, order does not overturn its oral ruling at the August 11, 2006, hearing, in which it gave Mr. Anderton and Prime Time permission to file the second action and the Second Notice of Lis Pendens. Second, even if the written order did supersede the court's oral ruling, Mr. Anderton and Prime Time were not in possession of the August 14, 2006, written order when the second action and the Second Notice of Lis Pendens were filed. (Appellants' Brief, pp. 25-29.) There is no evidence in the record to suggest otherwise. At most, Mr. Anderton and Prime Time's counsel may have been made aware of the existence of the written order. However, Mr. Anderton and Prime Time had not been notified about the order at the time the Second Notice of Lis Pendens was filed.

Notice of Lis Pendens and specifically requested a hearing to contest that injunction. [R. at 83.] Subsequently, Mr. Anderton and Prime Time filed the Answer to Petition and Verified Counterclaim in which they specifically disputed all of the allegations contained in Sage's Petition for injunction.

- Mr. Anderton and Prime Time then filed a motion to dissolve the Ex Parte Civil Wrongful Lien Injunction arguing that the injunction should be dissolved because the First Notice of Lis Pendens was properly filed and should not have been nullified. [R. at 103-104.]

- During the August 11, 2006, hearing, counsel for Mr. Anderton and Prime Time argued, at length, that no wrongful lien had been filed against the Property and that Prime Time was entitled to maintain its First Notice of Lis Pendens. [R. at 969, pp. 9-29.]

- Mr. Anderton filed an Objection to Petitioner's Proposed Form of Findings and Order on August 28, 2006, that specifically states that "Respondents maintain that the Notice of Interest was in fact lawful." [R. at 262.]

Sage also argues that Mr. Anderton and Prime Time failed to preserve any objection to nullification of the Second Notice of Lis Pendens. (Opposition Brief, pp. 27-31.) However, Mr. Anderton and Prime Time preserved this issue for appeal in the only way they could given that they were without representation at the August 16, 2006, hearing, during which the lower court granted Sage's motion to remove that lis pendens. Mr. Anderton and Prime Time made several attempts to bring their objections to this removal to the attention of the lower court after the hearing on that matter:

- On September 20, 2006, Mr. Anderton filed an Objection to Petitioner's Proposed Form of Findings and Order, in which he objected to the fact that neither he nor Prime Time had had any opportunity to contest Sage's attempts to remove the Second Notice of Lis Pendens. [R. at 333-335.]

- In his October 3, 2006, Memorandum in Support of Motion to Stay Contempt Hearing, Mr. Anderton argued that the Second Notice of Lis Pendens was improperly removed by the lower court given that it was expressly authorized by the lower court and given that it was tied to a pending matter before another judge. [R. at 400.]

- On October 4, 2006, Mr. Anderton requested a rehearing or amendment of the judgment removing both of the lis pendens. [R. at 420.]

Mr. Anderton and Prime Time cannot be prejudiced by their inability to make these arguments at the August 16, 2006, hearing given that they were deprived of representation at the hearing. Utah R. Civ. P. 46 ("if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him"). Mr. Anderton and Prime Time made every effort to bring the impropriety of the removal of the Second Notice of Lis Pendens before the Court after their counsel withdrew without argument on the issue during the August 16, 2006, hearing. Mr. Anderton was denied relief on each of these occasions. Accordingly, these issues are properly before this Court on appeal.

Additionally, even if Mr. Anderton and Prime Time failed to preserve the issue regarding the propriety of nullifying the Second Notice of Lis Pendens, they are entitled to raise this issue on appeal under the "plain error" and "exceptional circumstances" exceptions to the preservation rule. (Appellants' Brief, pp. 37-44.) Sage argues that Mr. Anderton and Prime Time direct their "plain error" argument to the wrong error. (Opposition Brief, pp. 27-28.) However, the analysis set forth in Appellants' Brief applies equally to the trial court's nullification of the Second Notice of Lis Pendens. The Second Notice of Lis Pendens was properly filed pursuant to the lower court's express permission. Accordingly, nullifying it was an error. The error should have been obvious to the trial court given that, five days earlier, it specifically told Mr. Anderton and Prime Time that they could file a separate action against Sage and file a lis pendens in

connection with that action. [R. at 969, pp. 55-58.] Mr. Anderton and Prime Time were harmed by the error because the nullification of the Second Notice of Lis Pendens allowed Sage to sell the Property to a third party. Accordingly, Mr. Anderton and Prime Time were unable to preserve their interest in the Property and were harmed thereby.[12]

VI. BECAUSE THE LOWER COURT ERRED IN GRANTING THE WRONGFUL LIEN INJUNCTION, THE AWARD OF ATTORNEYS' FEES SHOULD ALSO BE REVERSED.

The lower court awarded Sage substantial attorneys' fees and costs in association with the injunction. [R. at 373-375.] Because the lower court erred in issuing the injunction, the award of attorneys' fees and costs should also be reversed.

VII. CONCLUSION.

Based on the foregoing, this Court should reverse the lower court's holdings and likewise, reverse the award of attorneys' fees and costs to Sage.

DATED this 18th day of July 2007.

Barbara K. Polich

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[12] Sage argues that Mr. Anderton and Prime Time concede that they failed to preserve this issue in the lower court. (Opposition Brief, p. 26.) To the contrary, Mr. Anderton and Prime Time simply argue that even if this issue was not properly preserved, it is appealable under the "plain error" and "exceptional circumstances" doctrines.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 18th day of July, 2007, I caused to be mailed, via First Class Mail, postage prepaid, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANTS JOSEPH D. ANDERTON AND PRIME TIME MARKETING SERVICES, INC.** to the following:

John D. Morris, Esq.
Jamie L. Nopper, Esq.
McKay, Burton & Thurman
170 South Main Street, Suite 800
Salt Lake City, UT 84101

Dianne B. Swan

CERTIFICATE OF SERVICE

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